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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 DENNIS JAMES GRAVES,

14 Defendant.
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Case No. 2:09-CR-00502-KJD-PAL
2:13-cv-00603-KJD-PAL

ORDER

16 Presently before the Court is the Order of the Ninth Circuit Court of Appeals directing the
17 Court to grant or deny a certificate of appealability and stating the grounds for doing so. In order to
18 proceed with an appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1);
19 Fed. R. App. P. 22; 9th Cir. R. 22-1; Allen v. Ornoski, 435 F.3d 946, 950-951 (9th Cir. 2006); *see*
20 *also* United States v. Mikels, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make
21 “a substantial showing of the denial of a constitutional right” to warrant a certificate of appealability.
22 Id.; 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). “The petitioner must
23 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
24 claims debatable or wrong.” Id. (*quoting* Slack, 529 U.S. at 484). In order to meet this threshold
25 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of
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1 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve
2 encouragement to proceed further. Id.

3 In this action, Appellant raised claims that his trial counsel was ineffective for failing to
4 investigate and raise certain claims at trial, failing to file a motion to suppress his confession, and
5 failing to object to certain evidence at trial. However, Appellant is unable to make a substantial
6 showing of a denial of a constitutional right, because the undisputed record shows that this Court's
7 assessment of the claims is clearly not debatable or wrong. Primarily, Appellant's claims were denied
8 because he was factually wrong about the record before the Court. The trial transcript clearly showed
9 that his counsel had investigated factual issues and raised those claims at trial through examination or
10 cross-examination of witnesses. Further, counsel's failure to file a motion to suppress or object to
11 evidence at trial did not constitute ineffective assistance of counsel, because doing so would have
12 been futile. In addition to being clearly legally wrong about the evidentiary issues, the trial transcript
13 shows that Appellant was factually wrong about many of the assertions in his motion. Therefore, the
14 Court must decline to issue a certificate of appealability, because Appellant cannot make a substantial
15 showing that he was denied a constitutional right.

16 **IT IS SO ORDERED.**

17 DATED this 16th day of December 2013.

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21 Kent J. Dawson
22 United States District Judge
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